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**IN THE UNITED STATES DISTRICT COURT**  
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**FOR THE DISTRICT OF ARIZONA**  
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9 Everett Gregory Casteel,  
10 Petitioner,  
11 v.  
12 Maricopa County Sheriff's Department, et  
13 al.,  
14 Respondents.

No. CV-13-01832-PHX-DJH (BSB)

**REPORT AND  
RECOMMENDATION**

15 On January 22, 2014, Petitioner filed an Amended Petition for Writ of Habeas  
16 Corpus pursuant to 28 U.S.C. § 2254. (Doc. 7.) On December 23, 2014, Respondents  
17 moved to transfer the Amended Petition to the Ninth Circuit Court of Appeals pursuant to  
18 Ninth Circuit Rule 22-3. (Doc. 23.) Respondents also requested a stay of the deadline  
19 for filing their answer pending the Ninth Circuit's ruling. (*Id.*) On January 8, 2015,  
20 Petitioner filed a motion to dismiss the request for transfer and stay (Doc. 24), and a  
21 motion to deny the request for transfer and stay (Doc. 25), which the Court construes as  
22 responses to Respondents' motion.

23 **I. Discussion**

24 Ninth Circuit Rule 22-3(a) provides that:

25 [a]ny petitioner seeking authorization to file a second or  
26 successive 2254 petition or 2255 motion in the district court  
27 must file an application in the Court of Appeals  
demonstrating entitlement to such leave under 28  
U.S.C. § 2244 or § 2255. . . . If a second or successive petition  
or motion, or an application for authorization to file such a

1 petition or motion, is mistakenly submitted to the district  
 2 court, *the district court shall refer it to the court of appeals.*

3 (Emphasis added).

4 Here, Petitioner has filed a successive petition challenging the same conviction  
 5 (Maricopa County Superior Court case No. CR2007-116559) that he challenged in a  
 6 previous petition for writ of habeas corpus. (*Compare Doc.7 with Casteel v. Ryan, CV-*  
 7 *12-00182-PHX-GMS.*) That petition was dismissed as time barred. *See Casteel v. Ryan,*  
 8 *CV-12-00182-PHX-GMS at docs. 53, 55, 56.* Accordingly, the Amended Petition is a  
 9 “second or successive” petition under 28 U.S.C. § 2244(b), which Petitioner may not file  
 10 in this Court without permission from the Ninth Circuit. *See McNabb v. Yates, 576 F.3d*  
 11 *1028, 1029 (9th Cir. 2009)* (holding “that dismissal of a section 2254 habeas petition for  
 12 failure to comply with the statute of limitations renders subsequent petitions second or  
 13 successive for purposes of the AEDPA, 28 U.S.C. § 2244(b).”).

14 Because there is no evidence that Petitioner obtained permission to file this  
 15 Amended Petition from the Ninth Circuit, this Court lacks jurisdiction to consider the  
 16 merits of the Amended Petition. *See Burton v. Stewart, 549 U.S. 147, 157 (2007)* (“The  
 17 long and short of it is that Burton neither sought nor received authorization from the  
 18 Court of Appeals before filing his 2002 petition, a ‘second or successive’ petition  
 19 challenging his custody and so the District Court was without jurisdiction to entertain  
 20 it.”).

21 Based on the procedural posture of this case, the Amended Petition should be  
 22 transferred to the Ninth Circuit pursuant to Ninth Circuit Rule 22-3.

## 23 II. Conclusion

24 Accordingly, the Court should transfer this matter as a second or successive  
 25 petition and administratively close the case.

26 Accordingly,

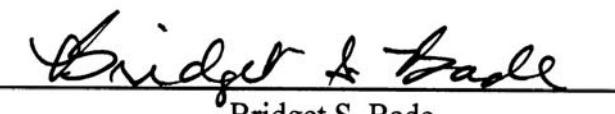
1       **IT IS RECOMMENDED** that the Court **GRANT** Respondents' Motion to  
2 Transfer (Doc. 23), transfer the Amended Petition to the Ninth Circuit Court of Appeals  
3 as a second or successive petition, and administratively close the case.

4       **IT IS FURTHER RECOMMENDED** that the Court **DENY** as moot  
5 Respondents' motion to stay the time for filing an answer. (Doc. 23.)

6       **IT IS FURTHER RECOMMENDED** that the Court **DENY** as moot Plaintiff's  
7 motion to dismiss the request for transfer and stay (Doc. 24), and motion to deny the  
8 request for transfer and stay (Doc. 25), construed as responses to Respondents' motion.

9       This recommendation is not an order that is immediately appealable to the Ninth  
10 Circuit Court of Appeals. Any notice of appeal pursuant to Federal Rule of Appellate  
11 Procedure 4(a)(1), should not be filed until entry of the District Court's judgment. The  
12 parties have fourteen days from the date of service of a copy of this recommendation  
13 within which to file specific written objections with the Court. *See* 28  
14 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6 and 72. Thereafter, the parties have fourteen days  
15 within which to file a response to the objections. Failure to file timely objections to the  
16 Magistrate Judge's Report and Recommendation may result in the District Court's  
17 acceptance of the Report and Recommendation without further review. *See United States*  
18 *v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to  
19 any factual determination of the Magistrate Judge may be considered a waiver of a  
20 party's right to appellate review of the findings of fact in an order or judgment entered  
21 pursuant to the Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

22       Dated this 12th day of January, 2015.  
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Bridget S. Bade  
United States Magistrate Judge